

Date of Decision: 15th November 1995

CRIMINAL APPEAL NO. 1035 OF 1988

with

CRIMINAL APPEAL NO. 1036 OF 1988

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA
AND

HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? No
3. Whether their Lordships wish to see the fair copy of judgment? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

Shri H.N. Chinoy, Advocate, for the Appellant (in both appeals)

Shri S.R. Divetia, Addl. Public Prosecutor, for the Respondent
(in both appeals)

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.
(Date: 15th November 1995)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Kheda at Nadia on 24th November 1988 convicting both the appellants hereinunder sec. 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act for brief) and sentencing them to rigorous imprisonment for 10 years each and fine of Rs. 1 lakh each in default rigorous imprisonment for one year each is under

challenge in these two appeals at the instance of the two original accused.

2. It is not necessary to set out in detail the facts giving rise to both these appeals. It may be sufficient to note that on prior information the 2nd Police Sub-Inspector of the Police Station at Umredh searched the persons of both the appellants on 8th November 1987 and from each of them was found opium of about 350 gms. from appellant Mangilal and 50 gms. from appellant Bhammarlal. Thereupon the concerned police officer lodged his complaint. The proceeding arising therefrom culminated into the conviction of both the appellants herein with the aforesaid sentence awarded to them.

3. It clearly transpires from the material on record that no option was given to the appellants herein or either of them before subjecting them to search of their person whether or not they would like to be searched in presence of a gazetted officer or a magistrate as provided in sec. 50 of the Act. The aforesaid statutory provision has been held to be mandatory by the Supreme Court in its ruling in the case of Saiyad Mohd. Saiyad Umar Saiyad and others v. State of Gujarat reported in 1995(2) 36(2) GLR 1315. Since the requirements of the aforesaid statutory provision are not complied with, the conviction and sentence of the appellant in each case cannot be sustained in law in view of the aforesaid binding ruling of the Supreme Court.

4. In the result, both these appeals are accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Kheda at Nadiad on 24th November 1988 in Sessions Case No. 45 of 1988 is quashed and set aside. The appellants are ordered to be set at liberty forthwith if no longer required in any other case.